Supreme Court, U.S.
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No. 85-199

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

Dellinger, Inc. and Theodore C. Dellinger,

Petitioners,

vs.

United States of America,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Fourth Circuit Court of Appeals

CORRECTED COPY

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QUESTIONS PRESENTED

I.

The Petitioners were on trial for a conspiracy to rig bids on a utility construction project in Lancaster, South Carolina. During the cross-examination of Theodore C. Dellinger, the prosecutor asked a series of questions resulting in Dellinger's denial of any involvement in rigging bids on an unrelated Kensington, South Carolina utility project. Over objection, and despite the Court's observation that the prosecution was "getting pretty far afield", the Respondent was permitted to call a new reply witness for the sole purpose of impeaching Dellinger by extrinsic evidence. The question presented for review is whether or not evidence specifically excluded by Federal Rule of Evidence 608(b) may nevertheless be admitted if it falls within the Federal Rule of Evidence 404(b) definition of relevant.

II.

One of the two principal witnesses against the Petitioners, an alleged co-conspirator, was permitted to testify about his vague recollections of Ted Dellinger participating in bid rigging instances unrelated to the charges in the indictment. While characterizing the testimony as "weak testimony", the trial court nevertheless admitted it under Federal Rule of Evidence 404(b). The question presented is whether or not evidence of other, similar acts constituting crimes must be clear and convincing before it can be thus admitted.

III.

The Petitioners were charged with a felony. The jury was instructed that the government did not have to prove that they specifically intended to violate the law. The question presented is whether or not a defendant may be convicted of a Sherman Anti-trust felony without the jury finding Specific Intent.

IV.

The jury was instructed that proof beyond a reasonable

doubt is established if the evidence is such as it would be willing to rely and act upon in the more important affairs of the jurors own lives, refusing to cast the charge in terms of the kind of doubt that would make a reasonable person hesitate to act. The question presented is whether or not the nature of a Reasonable Doubt, and the accused's right to the benefit of such a doubt, is so fundamental to the concept of ordered liberty that the failure to fairly define it deprives a defendant of Due Process of Law.

V.

A United States Magistrate presided over the case during the jury deliberations at the request of the presiding Trial Judge who left because of a prior committment. The jury requested that the testimony of the Government's two principal witnesses be read back. In the course of trying, unnecesarily, to explain an unsuccessful attempt to streamline that re-reading, the presiding Magistrate characterized one of the witnesses' testimony as going "more directly" into the matters in which the jury was interested. The testimony of the two witnesses was corroborative in some particulars and contradictory in others. The question presented is whether or not a Magistrate who presides in the absence of the Trial Judge may comment upon the evidence.

PARTIES

In addition to the parties identified in the caption of the case before this Honorable Court, Smith Grading and Paving, Inc. and Herbert P. Lee, III were Appellants to the Fourth Circuit Court of Appeals. Dellinger, Inc. is neither a subsidiary nor affiliate of any other corporation.

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PETITION FOR WRIT OF CERTIORARI TO THE FOURTH CIRCUIT COURT OF APPEALS

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

Dellinger, Inc. and Theodore C. Dellinger, the Petitioners herein, pray that a Writ of Certiorari issue to review the judgment of the Fourth Circuit Court of Appeals entered in the above entitled case on April 22, 1985.

REPORTS OF OPINION BELOW

The Opinion of the Fourth Circuit Court of Appeals is reported at 760 F.2d 527 and is printed in Appendix A hereto, *infra*, page 21. The journal entry of judgment of the United States District Court for the District of South Carolina is printed in Appendix C hereto, *infra*, page 35.

JURISDICTION

The judgment of the Fourth Circuit Court of Appeals (Appendix B, *infra*, page 33) was entered on April 22, 1985. A timely Petition for Rehearing was filed on May 7, 1985 and denied on June 6, 1985 (Appendix C, *infra*, page 34). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

This case involves a six-count indictment brought against four Defendants for bid-rigging a sewer construction project in Lancaster, South Carolina. The Farmers Home Administration funded the four-part sewer project. Theodore C. Dellinger is the President of Dellinger, Inc. and is responsible for his company's bids. Dellinger and Dellinger, Inc. were charged, in count one of the indictment, with conspiring with unnamed co-conspirators and with two co-defendants, Smith Grading and Paving, Inc. and Herbert P. Lee, III, to rig bids on the Lancaster sewer project in violation of §1 of the Sherman Act, 15 USC 1. Counts two and three charged Dellinger and Dellinger, Inc. with submitting false statements in their bids in violation of 18 USC 2 & 18 USC 1001. Counts four, five and six of the indictment related only to the co-defendants Lee and Smith Grading and Paving, Inc. At trial the jury found the defendants guilty on all counts.

Bids for the Lancaster project were to be submitted on December 19, 1978. Prior to that time, Dellinger obtained plans and specifications for the installment of the sewer lines. After reviewing the plans and visiting the site, Dellinger decided to submit bids on two of the four sections, while also preparing himself to quote subcontract work on the other two sections. As was customary on the evening before such bid lettings, Dellinger, and others, arrived at a local motel. He ate with several contractors, subcontractors, and materials suppliers. On the way back to his motel room, Dellinger passed the room of Steve Zeigler, an employee of Boozer and Wharton, Inc., another company bidding on the Lancaster project; there were several

suppliers and contractors in Zeigler's room at the time. While Dellinger had no specific recollection of being in Steve Zeigler's room, he did not deny it. He did, however, emphatically deny participating in any discussion there that would have amounted to a conspiracy to rig bids. Also present in the room was Frank Carpenter, an employee of Dickerson, Inc., another company bidding on the Lancaster project.

Dellinger did discuss with Zeigler at some point the possibility of Dellinger being interested in serving as a subcontractor in the event that the Boozer and Wharton, Inc., a larger concern, was a successful bidder on any of the four sections of the Lancaster project. On that evening, Dellinger had not yet determined on which sections he intended to bid and on which sections he intended to seek to serve as a subcontractor. Early the next morning, however, Dellinger informed Zeigler of his interest in serving as a subcontractor on two sections (sections 2 and 4), and gave prices for which he would be willing to do subcontract; Dellinger did not later bid sections 2 and 4, on which he had given such prices. On the days leading up to December 19th, Dellinger had made several attempts to contact other utility construction companies for the purpose of indicating his interest in quoting subcontract prices on the sections he did not intend to bid.

Zeigler later pleaded guilty to a charge of bid-rigging in connection with the Lancaster project, agreeing to cooperate with the Government in its investigation of the matter. Frank Carpenter pled guilty to bid rigging, on certain North Carolina utility projects, and agreed to assist the Government in its investigation of the Lancaster project, following the Government's agreement to drop several other charges. Carpenter and Zeigler testified that Dellinger had met with them to discuss the possibility of "setting the job up". Both stated that they agreed with Dellinger and Lee to contact other potential bidders on the project to see if cooperation could be secured. Both testified that no agreement was reached at that time as to dividing the four sections of the project. Neither

Zeigler nor Carpenter was able to remember anything Dellinger said on the evening of December 18th or that Dellinger was to call any other bidder. Although Zeigler testified that the four men who had met in his room on December 18th met there again the following morning, each of the others, including Carpenter, denied any such subsequent meeting. Carpenter said he did not speak to Dellinger between the brief meeting on the evening of December 18th and the time of the bid letting.

ARGUMENT

This would have remained a relatively unremarkable case to all except its immediate parties had it not been so tried and submitted to the jury, and so decided by the Fourth Circuit Court of Appeals, as to raise questions both fundamental and far-reaching in Federal Criminal Law, for which reasons certiorari should be granted by this Honorable Court.

OTHER ACTS

Certain requirements should be met for evidence of other crimes to be admissible under Rule 404(b) FRE. First, a material issue on which other crimes evidence may be admissible must be raised. *U.S. v. Drury*, 582 F.2d 1181, 1184 (CA8, 1978); *U.S. v. Powell*, 587 F.2d 443 (CA 9, 1978); *U.S. v. Figueroa*, 618 F.2d 934 (CA 2, 1979). Second, the proferred evidence must be relevant to the issue so raised, *ibia*. Third, the evidence of the other crimes must be clear and convincing. *U.S. v. Cobb*, 588 F.2d 607, 612 (CA 8, 1978); *U.S. v. Dixon*, 596 F.2d 178 (CA 7, 1979); *U.S. v. Bronco*, 597 F.2d 1300 (CA 9, 1979). Fourth and finally, evidence otherwise admissible under Rule 404(b) may be excluded under Rule 403 FRE "if its probative value is substantially outweighed by the danger of unfair prejudice . . ." *U.S. v. Fredrickson*, 601 F.2d 1358, (CA 8, 1979); *U.S. v. Bronco, supra*; *U.S. v. Dolliole*, 597 F.2d 102 (CA 7, 1979).

The Opinion below, however, held that "Prior bad acts of the Defendant are admissible under Rule 404(b) as long as they are

offered for a purpose other than to prove bad character and are more probative than prejudicial." That two-pronged test materially conflicts with the Second, Eighth, and Ninth Circuits to the extent that it ignores that when a Defendant denies participation in the *acts* which constitute the crime, intent is not a material issue for the purpose of applying Rule 404(b) *Powell, supra*. That conflict is particularly noticeable in this case where the Trial Court itself, at the prosecution's instance, ruled that only knowledge, and not intent, was a necessary element of the Government's proof.

The other missing prong of the Fourth Circuit test, as contrasted to that of the Seventh, Eighth and Ninth Circuits is that the evidence of the other acts be "clear and convincing". The objected-to testimony of the Government's witness, Frank Carpenter, was unusually vague and non-specific. To the extent that it had any probative value, it was produced only by the Court permitting leading questions of the Government's principal witness.[1] Following the testimony, the Court characterized it as "weak" even as it ruled the evidence admissible. Evidence cannot be both "weak" and "clear and convincing". Only by applying the Fourth Circuit's two-pronged test at the expense of the four-pronged test of the cited Circuits can such testimony be admissible. The record also reflects that there was inadequate consideration of the probative value of the evidence at the trial level, since the Trial Judge ruled the testimony admissible without having heard it, or a proffer of it: "Based upon what I have heard about this case, I would have no hesitance in finding that the probative value of this evidence would substantially outweigh any unfair prejudice."

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[1] A typical answer to a line of questioning concerning whether or not Carpenter had ever "rigged bids" with Dellinger went, variously: "I cannot recall specifically having a conversation with Mr. Dellinger, but I feel that I must have" or "I am of the opinion that I did have some conversations with someone at Dellinger (Inc) about this. I cannot remember the conversation."

EXTRINSIC EVIDENCE AS IMPEACHMENT

Dellinger testified. On direct examination he neither was asked questions nor volunteered answers about a Kensington, South Carolina project, nor did he make a general denial of having participated in bid-rigging above and beyond those concerning which the Government had introduced evidence in its case-in-chief. The first mention of the Kensington, South Carolina project came up during the prosecution's cross-examination of Dellinger, and he denied Kensington bid-rigging or bid comparison. When, in reply, the prosecution offered one Henry Weathersby as a witness the Trial Court failed to exercise any discretion in the admission of that testimony but just went "along at (the prosecutor's) insistence" even while recognizing that the testimony was "getting pretty far afield". Weathersby's testimony contradicted Dellinger and was offered by the prosecution only for purposes of impeachment.

A central principal of this Honorable Court's ruling in *Agnella v. United States*, 269 U.S. 20 (1925) is that the Government may not cross-examine on collateral matters not testified-to on direct in order to establish a ground for the admission of otherwise inadmissible evidence. The doctrine of *Walder v. United States*, 347 U.S. 62 (1954) gives a Trial Judge discretion to admit otherwise inadmissible extrinsic evidence tending to contradict any specific testimony volunteered by a witness on direct examination. But nothing in the *Walder* decision suggests that it authorizes the Government to elicit denials on collateral issues during cross-examination to lay a trip which will be sprung in rebuttal. Cf. *U.S. v. Havens*, 446 U.S. 620 (1980) and *U.S. v. Leon*, ____ U.S. ____, 82 L. Ed.2d 677 (1984).

The Fourth Circuit's ruling in *U.S. v. Whiting*, 311 F.2d 191, 196 (1962) that a witness may be questioned as to past misconduct even as to collateral matters in order to impeach his credibility, but that the interrogator is bound by his answers and may not contradict him, and that the extent of the examination is within the discretion of the Trial Judge, were later explicitly adopted in Rules 608(b), and 611 of the Federal Rules of

Evidence. The construction adopted now by the Fourth Circuit would permit cross-examination with respect to other crimes solely for the purpose of creating credibility issues, which presents a Defendant who takes the stand with a choice of either admitting prior uncharged acts of misconduct or of opening the door to presentation of such acts in rebuttal. The net effect of that rule is to permit the introduction of specific acts of prior misconduct whenever a Defendant takes the stand. That result cannot be squared with the provisions of Rule 608(b). For those reasons Federal Courts which have considered the question have limited the use of impeachment by contradiction to specific false statements made or fairly implied by Defendants on direct examination or to statements volunteered by the Defendant on cross-examination. *U.S. v. Pantone*, 609 F.2d 675 (CA 3, 1979).

The Opinion below acknowledges that the Weathersby testimony falls within the scope of Rule 608(b), which would result in its exclusion, but also goes on to hold that it falls within the scope of Rule 404(b), which would result in its inclusion, deciding that Rule 404(b) takes priority over Rule 608(b). The Opinion candidly acknowledges that its ruling undermines the purpose of Rule 608(b) in the circumstances presented in this case.

Rule 404(b) is included in FRE Article IV: RELEVANCY and ITS LIMITS; it is a rule of relevance. It establishes that evidence of other acts constituting crimes may be relevant to prove certain issues, but is not relevant to prove that a person acted in conformity with a particular trait of character. Rule 402 is also a rule of relevance. It provides that all relevant (tending to prove a fact in issue) evidence is admissible unless otherwise provided. The type of analysis engaged in by the Fourth Circuit's Opinion is applicable to any proffered evidence which is relevant, but excluded by a specific provision of the Federal Rules of Evidence. For example, Rule 410 specifically prohibits the use of testimony taken at a guilty plea, later withdrawn. Under the Fourth Circuit's analysis, Rule 410 would yield to Rule 404(b) whenever the testimony taken at a plea of guilty,

later withdrawn, also tended to prove intent, motive or the like in a subsequent trial on another charge. A similar analysis could be performed with regard to the exclusionary 802 Hearsay Rule, so long as the Hearsay was relevant to an issue specified in Rule 404(b). Logically extended, the Fourth Circuit's new rule is that any evidence excluded by the Federal Rules of Evidence is, nevertheless, admissible so long as it is relevant to a fact at issue in the trial. It is inappropriate to create a balancing test between the general, discretionary rule of FRE 404(b) and the specific, mandatory prohibition of FRE 608(b) and then judicially eradicate 608(b) whenever they conflict.

THE MAGISTRATE'S COMMENTS ON THE EVIDENCE

At 9:30 P.M. on the first day of the jury's deliberations, the jury returned from a dinner break following their re-hearing of the testimony of Frank Carpenter. Prior to the re-hearing of the testimony of Zeigler, the United States Magistrate presiding in the Trial Judge's absence stated:

> I don't know how long the reading of this next testimony will take. We will just have to play it by ear. I would hope that we can get out of here by 11:00, but I may be a little optimistic, because I have been advised by counsel and the Court Reporter that the witness is about the same length as the testimony who was previously read to you.
>
> Counsel endeavored to go over the testimony of the next witness that you wanted to hear to see if there could be any agreement reached as to eliminating any portions of the testimony that might not be directed to the precise question that you asked, and I am advised that they have been unable to come to any firm agreement on that because apparently the next witness's testimony goes more directly into the circumstances that you want to hear than the previous witness's testimony. So you will just have to bear with the person who is reading the transcript.

An essential part of the defense in this case was the internal contradictions in the Government's own case, such as the contradiction between Carpenter's and Zeigler's version of events. If Carpenter was to be believed by the jury, then Zeigler's testimony was not worthy of belief. In addition, Zeigler's testimony contained internal contradictions which had produced some successful impeachment. Against this background, the remarks of the Magistrate were unwarranted in three respects. First, there is no rule or practice permitting any person other than the Presiding Trial Judge to comment to the jury upon the evidence. Second, the Magistrate's comments gave the jury the impression that he found Zeigler's testimony to be more direct than Carpenter's, presumably, therefore, more candid, forthright, cogent, and all of the other impressions that the jury would infer from his use of the words "goes more directly into the circumstances". Since this jury was well aware that the Magistrate had not even heard that testimony when it was given, then such an impression, if the Magistrate's, could have been garnered only from (A) a careful review of Zeigler's transcript or (B) from a knowledge acquired from being in and around the Court or (C) from conversations with the Presiding Judge, others of which he had related in the course of explaining the Judge's absence. Third, the Magistrate's remarks implied that "they" including defense counsel, had evaluated Zeigler's testimony as going "more directly into the circumstances".

Since the jury knew the Magistrate had not heard the testimony, it is highly likely that the jury inferred from his remarks that even the defense counsel had informed him that Zeigler's testimony was more direct, hence believable, than Carpenter's. Such a departure from the usual course of legal proceedings in Federal Courts calls for this Honorable Court to exercise its supervisory powers.

REASONABLE DOUBT

When read as a whole, the instruction on Reasonable Doubt herein sanctioned by the Fourth Circuit's Opinion was confus-

ingly prejudicial. There are only two firm anchors in that instruction: (1) proof beyond a reasonable doubt is something more than conjecture and (2) it is something less than absolute certainty. There are an infinite number of possible degrees of proof between conjecture, on the one hand, and absolute certainty, on the other, but the instruction did not even clarify whether proof beyond a Reasonable Doubt is equal to or greater than the preponderance of the evidence. The only remark made in the course of attempting to quantify that mystical, yet critical, point at which proof beyond a Reasonable Doubt is reached came when the jury was charged: "Proof beyond a reasonable doubt is established if the evidence is such as you would be willing to rely and act upon in the more important matters of your own life." Somewhat later, the jury was advised that "There is nothing really peculiarly different in the way in which you are to consider the proof in this criminal case from that in which all reasonable persons treat any question, depending upon evidence presented to them."

Such a charge omits that very language which distinguishes between willingness and hesitancy to act in matters of like importance in a reasonable person's life. A reasonable person may be *willing* to rely and act upon a relatively low degree of proof, and in the face of doubt. It is the hesitancy to so rely or to so act that is of the very essence of a reasonable doubt. Life is full of uncertainty; the ability of people to gather the necessary information to act is limited by time, talent, and money. In common human experience, one must sometimes act *without* the information necessary to feel that the action is correct beyond a reasonable doubt. Even a reasonable person will sometimes act upon probabilities, instinct, intuition, hunch, or guess. The fact that one may be *willing* to act without adequate facts does not mean that the actor has no reasonable doubt as to the correctness of his action. A reasonable man may be quite willing to choose a spouse, an educational institution, or a job when convinced by a preponderance of the evidence, or by raw emotion, that his choice is the correct one; rare indeed is the reasonable

man who would agree that he was convinced beyond a reasonable doubt at the time the choice was made, because such choices are usually accompanied by hesitation or pause.

Mr. Justice Holmes approved an instruction reflecting that delicate pause in *Holt v. U.S.*, 218 U.S. 245, 254 (1910), ". . . and if you believe that a reasonable man in any matter of like importance would *hesitate to act* because of such a doubt as you are conscious of having, that is a reasonable doubt . . . ." (Emphasis supplied) Mr. Justice Vinson used the "hesitate to act" formulation in *Bishop v. U.S.*, 107 F.2d 297, 303 (DC App. 1939). Although no exception had been taken to the charge below, this Honorable Court, in *Holland v. U.S.*, 348 U.S. 121, 140 (1948) reiterated its preference for "the kind of doubt that would make a person hesitate to act (citing *Bishop*) rather than the kind on which he would be willing to act." See also, *In the Matter of Samuel Winship*, 397 U.S. 358 (1970).

For more than seven decades some of the most esteemed jurists this land has produced have stated, or concurred, in the definition of reasonable doubt urged upon the Trial Court in this case. The issue having been preserved for review, no more convincing reason for the exercise of this Court's supervisory powers regarding an issue of fundamental importance in Federal criminal trials can be put forth than the one expressed by the Trial Judge:

> Well, I gave the charge in the manner I have been giving it for years, and if you can convince that fine Fourth Circuit I was wrong in not using your terminology, it is about time they let me know about it.

MENS REA

In submitting this case to the jury, the District Court rejected the Petitioner's proposed "Specific Intent" instruction drawn from *J.E. Devitt and C. Blackmar, Federal Jury Practice and Instructions*, §14.03 (1977), and a further instruction drawn largely from *U.S. v. United States Gypsum Company*, 438 U.S. 422 at 435, 437, 439, 443 n.20, 446 (1978), that the mere passing

of price information does not create an inference of a conspiracy but that two different types of intent are required: the basic intent to agree, and the more traditional intent to bring about the object of the conspiracy, which latter requirement is satisfied where carefully planned and calculated conduct by the perpetrator reveals his knowledge of the anticipated consequences.

The Sherman Anti-trust conspiracy discussed in *Gypsum* took place prior to the 1974 Amendments to that Act, which increased the penalties for and denominated such a conspiracy a Felony. A conspiracy is by no means a petty or trivial offense. It is an offense of a grave character, affecting the public at large. *Callan v. Wilson*, 127 U.S. 540 (1888). The word "felony" denotes a serious offense, which was used at common law to designate such serious offenses as were formerly punishable by death, or the forfeiture of the lands or goods of the offender. *Bannon and Mulkey vs. U.S.*, 156 U.S. 464 (1895).

According to the instruction given below, no *mens rea*, or "evil meaning mind" was necessary for convictions since the exchange of bidding information is a *per se* violation of the Sherman Act. The definition of the elements of a criminal offense is entrusted to the Legislature, particularly so in the case of Federal crimes, which are solely creatures of statute. *U.S. v. Hudson*, 7 Cranch 32 (1812). With respect to the element at issue in this case, however, Congress has not explicitly spelled out the mental state required, other than to indicate that such violations have now become felonies. But, as this Court noted in *U.S. v. United States Gypsum Company, supra*, "certainly far more than simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement" and that criminal offenses requiring no *mens rea* have a "generally disfavored status."

"The contention that an injury can amount to a crime only when inflicted by intention is not a provincial or transient notion. It is as universal and persistent in mature systems of law as

belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." *Morissette v. United States*, 342 U.S. 246 (1952). The offense charged herein is not a "public welfare" offense which, in most previous instances, have been recognized as offenses in which Congress has rendered criminal a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the company's health or safety. *Liparota vs. U.S.*, 53 U.S.L.W. 4530, 105 S.Ct. 2084 (1985).

The specific intent instructions urged by the Petitioners are particularly appropriate here, where "to interpret the statute otherwise would be to criminalize a broad range of apparently innocent conduct." *Liparota v. U.S., ibid.* A jury uninstructed as to the necessity for an evil-meaning mind could have believed Dellinger's testimony, rejecting Carpenter's and Zeigler's, and still have convicted the Petitioners. This is so because without such understanding the jury could determine that Delinger, by discussing subcontract prices with Zeigler and thereby enabling Zeigler to infer and transmit other pricing information to Zeigler's conspirators, was "participating" in a conspiracy. It is as true in a sophisticated criminal anti-trust case as in one involving any other criminal offense that intent should remain an indispensable element of the Government's proof, since it may be difficult for today's businessman to tell in advance whether projected actions will run afoul of the Sherman Anti-trust Act's criminal strictures. *U.S. v. United States Gypsum Company, supra*, at 439.

The Trial Court based its failure to give the requested instruction, in part, upon its misconception that certain parts of it are inappropriately "phrased in the language of a civil anti-trust action". It is incongruous, however, to suggest that criminal liability should be imposed for a wider range of violations than civil liability.

CONCLUSION

When evidence of other acts of a Defendant are admitted for the stated purpose of proving intent, and such evidence is not only vague and uncorroborated but also characterized by the Presiding Judge as "weak testimony" there exists a conflict between the Fourth Circuit Court of Appeals and the other Federal Courts of Appeals which require such evidence to be clear and convincing prior to its admissibility. When the Fourth Circuit Court of Appeals holds that the specific exclusion of FRE 608(b) must give way to the general relevancy rules of FRE 404(b), that a United States Magistrate may comment upon the evidence received by a jury, and that an instruction accurately stating the nature and function of Reasonable Doubt need not be given in a felony trial, then it has so far sanctioned a departure from the usual course of judicial proceedings as to call for an exercise of the supervisory powers of this Honorable Court.

If it is to be the law that the Federal Rules of Evidence shall be so construed as to cause specific exclusions stated therein to yield to general definitions of relevant evidence, and if relevancy is to be the only, or principal, test of admissibility then that is an important question of Federal Law which should be settled by this Court, not by the Fourth Circuit Court of Appeals. If it is to be the law that time-honored descriptions of reasonable doubt are unnecessary in a Federal criminal trial, or that they may be fundamentally altered to the detriment of a Defendant, then that is an important question of Federal Law which should be settled by this Honorable Court, not by the Fourth Circuit Court of Appeals. If it is to be the law that specific intent to effectuate the object of a Sherman Anti-trust Act felonious conspiracy is not an essential element to be proven beyond a reasonable doubt by the prosecution, then that is an important question of Federal Law which should be settled by this Honorable Court, not by the Fourth Circuit Court of Appeals.

This Court enunciated, in *United States Gypsum Company, supra*, that more is required than the basic intent to agree, including the specific intent to effectuate the object of the con-

spiracy; in sanctioning a lower degree of intent after Congress has created a felony out of such conspiracy, the Fourth Circuit Court of Appeals has decided a Federal question in a way in conflict with an applicable decision of this Court. In sanctioning a jury instruction on reasonable doubt which materially changes the standards set forth in *Holt, supra*, and *Holland, supra*, the Fourth Circuit Court of Appeals has decided a Federal question in a way in conflict with applicable decisions of this Court. Fundamental and important questions have been raised by the trial and Opinion below, and certiorari should be granted to settle them.

Wm. Reynolds Williams
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APPENDIX A

UNITED STATES of America, Appellee,
v.
SMITH GRADING AND PAVING, INC.
and Herbert P. Lee, III, Appellants.

UNITED STATES of America, Appellee,
v.
DELLINGER, INC. and Theodore C. Dellinger, Appellants.

Nos. 84-5130, 84-5131.

United States Court of Appeals,
Fourth Circuit.

Argued Feb. 8, 1985.

Decided April 22, 1985.

E. LeRoy Nettles, Sr., Lake City, S. C. (Marian D. Nettles, Nettles, Floyd, Turbeville, & Reddeck, Lake City, S. C., on brief), for appellants in No. 84-5130.

William Reynolds Williams, Florence, S. C. (Mark W. Buyck, Jr., Willcox, Hardee, McLeod, Buyck & Baker, Florence, S. C., on brief), for appellants in No. 84-5131.

(Richard S. Clark, Clark & Griffin, Monroe, N. C. on brief), for appellant.

Robert J. Wiggers, Robert B. Nicholson, J. Paul McGrath, Asst. Atty. Gen., Charles F. Rule, Deputy Asst. Atty. Gen., Carl W. Mullis, III, Katherine A. Schlech, Bargery G. Williams, Dept. of Justice, Washington, D. C., on brief), for appellee.

Before PHILLIPS, and WILKINSON, Circuit Judges; and RICHARD L. WILLIAMS, District Judge, Sitting by Designation.

RICHARD L. WILLIAMS, District Judge:

This case involves a six count indictment brought against four defendants for bid rigging a sewer construction project in Lancaster County, South Carolina. The Farmers Home Administration funded the four part sewer project.

Defendant Herbert P. Lee, III is an employee of defendant Smith Grading and Paving Inc. [Smith Grading] and is responsible for the company's bids on all utility-related projects. Defendant Theodore C. Dellinger is the president of defendant Dellinger, Inc. and is responsible for his company's bids. All four defendants were charged, in Count 1 of the indictment, with conspiring with unnamed co-conspirators to rig bids on the Lancaster County, South Carolina sewer project in violation of § 1 of the Sherman Act, 15 U.S.C. § 1. Counts 2 and 3 charged Dellinger and Dellinger, Inc. with submitting false statements in their bids in violation of 18 U.S.C. § 1001. Counts 4, 5 and 6 charged Lee and Smith Grading with filing false statements.

At trial the jury found the defendants guilty on all counts. On appeal defendants claim eleven reversible errors.

FACTS

Viewing the evidence in the light most favorable to the government, the prosecutor's case at trial established the following facts. On December 19, 1978 eleven companies submitted bids on one or more of the four parts of the Lancaster County sewer project. Frank Carpenter, representing Dickerson, Inc., was the low bidder on part 1, while B.S. Zeigler, representing Boozer and Wharton, Inc., successfully bid on part 2. Defendants Dellinger Inc. and Smith Grading were, respectively, the low bidders on parts 3 and 4 of the construction project.

Carpenter and Zeigler turned states evidence and testified as to the bid rigging scheme. According to their testimony, all four successful bidders stayed at the Carriage Inn in Lancaster County the night before the bid submission. After dinner, the four met in Zeigler's room, at which time Carpenter proposed that

they rig the sewer construction project. Each man was to be the low bidder on one of the four parts of the job. According to both Carpenter and Zeigler, defendants Lee and Dellinger concurred with the plan. The men exchanged figures and contacted other potential bidders. Telephone records and the amount of the bids corroborated the testimony.

DISCUSSION

Defendants' most significant claim on appeal involves the admissibility of extrinsic evidence of defendant Dellinger's prior bid rigging activities. On cross-examination the prosecutor asked Dellinger if he previously rigged a project in Kensington, South Carolina. Dellinger denied the allegation. The district court then allowed the government to present a rebuttal witness who testified that Dellinger participated in the Kensington bid rigging scheme. On appeal defendants argue that the trial court violated Federal Rule of Evidence 608(b) when it admitted the rebuttal evidence. Rule 608(b) prohibits a party from offering extrinsic evidence to prove specific instances of conduct for the purpose of attacking or supporting a witness's credibility.[1]

[1] In response, the government argues that the trial court properly admitted the evidence of Dellinger's past misconduct

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1. Federal Rule of Evidence 608(b) states,

"*Specific instances of conduct.* Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

"The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility."

under Federal Rule of Evidence 404(b).[2] Rule 404(b) allows a trial court to admit evidence of other crimes or wrongs if (1) it is offered for a purpose other than to prove a defendant's criminal character or propensity to commit the crime charged, and (2) the probative value of the evidence outweighs its prejudicial effect. *United States v. Tate*, 715 F.2d 864 (4th Cir.1983). In this case, the government argues that the rebuttal evidence of Dellinger's participation int he Kensington bid rigging scheme is relevant to the defendant's intent to enter a conspiracy to rig bids as well as his understanding of the nature of the scheme. It further argues that the disputed evidence is more probative than prejudicial.

As a preliminary matter, we acknowledge that the evidence at issue falls within the scope of both rules 608(b) and 404(b). The government's proof of Dellinger's participation in the earlier bid rigging scheme took the form of extrinsic evidence attacking a witness's credibility. The government did not have to accept the defendant's denial of participation. Yet, likewise, the evidence of Dellinger's prior bid rigging is relevant to his intent and knowledge of the charged conspiracy, which are material issues raised in Count 1 of the indictment. *United States v. United States Gypsum Co.*, 438 U.S. 422, 98 S.Ct. 2864, 57 L.Ed.2d 854 (1978). Under an abuse of discretion standard, the trial court did not err when it determined that the disputed evidence was more probative than prejudicial, for the close relationship between the prior illegial activity and the charged offense is probative of Dellinger's knowledge. *United States v. Marques*, 600 F.2d 742, 751 (9th Cir.1979).

[2] Given the fact that the evidence of Dellinger's earlier bid rigging falls within the scope of both rules, we must decide

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2. Federal Rule of Evidence 404(b) states,

"*Other crimes, wrongs, or acts.* Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

whether rule 404(b) takes priority over rule 608(b). All of the circuit courts presented with the conflict between the rules have held, at least implicitly, in favor of rule 404(b). These courts have allowed the admission of evidence of past bad acts, offered for a purpose other than to prove a defendant's bad character or propensity to commit a crime, despite the fact that the evidence came in after the defendant denied the misconduct on cross-examination. *See United States v. Jacobson*, 578 F.2d 863 (10th Cir.1978); *United States v. Batts*, 558 F.2d 513 (9th Cir.1977) *vacated* 573 F.2d 599 (9th Cir.1978), *cert. denied* 439 U.S. 859, 99 S.Ct. 178, 58 L.Ed.2d 168 (1979); *United States v. Herzberg*, 558 F.2d 1219 (5th Cir. 1977).

We agree with the other circuits. Rule 608(b) should not be read so broadly as to disallow the presentation of extrinsic evidence that is probative of a material issue in a case. Undoubtedly rule 404(b) will undermine the prupose of rule 608(b) in particular circumstances, such as those presented in this case.[3] However, the ultimate goals of the rules of evidence are best served by not reading any rule in isolation.[4] In light of the need to introduce probative evidence of material issues and, even more importantly, in light of the goal of ascertaining the truth in judicial proceedings, we affirm the trial court's admission of rebuttal testimony of prior bad acts, over the

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3. The purpose of the no extrinsic evidence rule found in 608(b) is to prevent undue delays of trial, surprise and prejudice. Rule 608(b) seeks to avoid proof of the underlying behavior, which may confuse or sidetrack the jury. Moreover, the rule is designed to protect a witness, by prohibiting extrinsic evidence offered solely for the purpose of attacking that witness's credibility. *See* Weinstein & Berger, *Weinstein's Evidence*, § 608(5).

4. The purpose of the Federal Rules of Evidence is found in rule 102. It states, "These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."

defendant's denial, given that the testimony satisfies the requirements of rule 404(b).

One consequence of our decision is it allows the government to present rule 404(b) evidence on rebuttal. We want to make clear, however, that the better practice is for the prosecutor to introduce this type of evidence in his or her case in chief. In most instances, evidence of a defendant's past bad acts will surface prior to trial on a motion in limine. At that time, on a proffer by the government, the trial court must determine whether the evidence is relevant, is admissible under rule 404(b), and whether the evidence is more probative than prejudicial.

However, if the government attempts to introduce past bad acts through cross-examination of the defendant or on rebuttal, the trial court should also determine whether the evidence is cumulative or necessary to prove an essential element of the crime charged. If the evidence is cumulative, the trial court should more closely scrutinize its prejudicial effect. If the evidence is necessary to prove an element of the charge, the trial judge may have erred in not sustaining the defendant's motion for a directed verdict of acquittal. Moreover, a defendant may have a valid objection, under federal rule 611(b), that the government's cross-examination exceeds the scope of the direct. These added considerations are necessary not only to limit the impact of rule 404(b) on rule 608(b), but also to limit the prejudicial effect of allowing the government to have the last say through evidence of a defendant's prior misconduct.

With these guidelines, we affirm the trial court's admission of rule 404(b) evidence over the defendants' 608(b) objection and now turn to the ten other claims raised by the defendants.

Defendants next contend that the trial court improperly admitted evidence of defendant Dellinger's prior bad acts during the government's case in chief. On direct examination, government witness Carpenter testified that he and Dellinger engaged in bid rigging on three other projects, two prior to and one after the Lancaster County sewer project. Carpenter did not remember his exact conversation with Dellinger. Defendants

claim that the evidence was more prejudicial than probative.

[3, 4] As mentioned previously, prior bad acts of a defendant are admissible under rule 404(b) as long as they are offered for a purpose other than to prove bad character and are more probative than prejudicial. In this case, the trial court properly admitted, during the government's case in chief, Carpenter's testimony. Dellinger's other bid rigging was probative of his knowledge of entering a bid rigging conspiracy. Moreover, the trial judge did not abuse his discretion by determining that the evidence was more probative than prejudicial as far as its effect on all four of the defendants.[5] On two separate occasions during trial, the court gave the jury a comprehensive instruction on the limited use of rule 404(b) evidence, which is the suggested procedure of this circuit. *See United States v. Teague*, 737 F.2d 378, 381 (4th Cir.1984).

Defendant's third claim of error focuses on the government's alleged failure to disclose exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Defendants contend they were denied due process of law because the government did not disclose evidence provided by the engineer who originally estimated the cost of the Lancaster County swere project. On cross-examination, the engineer testified that he deliberately under-estimated the project's cost and expected the bids to exceed his estimate. Prior to his testimony, the defendants were unaware of the information. They argue that the testimony was exculpatory because it illustrates that their bids were not excessively high and, therefore, should have been disclosed under *Brady*.

[5-7] Even if we assume that the engineer's testimony is exculpatory, its belated disclosure does not constitute reversible

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5. Defendants Lee and Smith Grading argue that the admission of Dellinger's past bad acts should have been excluded because it prejudiced them by association. This argument is also without merit. The trial judge property admitted evidence of Dellinger's prior misconduct and twice gave a cautionary instruction to the jury that the evidence was not to be considered against the other defendants.

error. No due process violation occurs as long as *Brady* material is disclosed to a defendant in time for its effective use at trial. *United States v. Higgs*, 713 F.2d 39 (3rd Cir.1983). In this case, the exculpatory information was put before the jury during cross-examination of the very first trial witness. The information was available for use in the defendant's cross-examination of all further government witnesses as well as in the defendants' case in chief. The disclosure of this exculpatory evidence, at trial, does not rise to the level of a constitutional violation.[6]

[8] Defendants' fourth claim of reversible error is that they were denied due process of law when the trial court refused to clarify an alleged inference of attorney misconduct. While on cross-examination, a government witness asked Dellinger's defense counsel whether he was the attorney paying him $500.00 per day. (The payment was a witness fee). A few minutes later, the trial court recessed for the day, but in the presence of the jury asked Dellinger's counsel to remain for a moment. The next morning the Court instructed the jury on the propriety of witness fees, but did not instruct the jury as to why the Court asked to speak to counsel.

Defendants argue that the trial court's failure to give the requested instruction left an inference of attorney misconduct, which in turn violated their right to a fair trial. The alleged error does not constitute a due process violation. The trial court explained to the jury that witness fees were proper, adequately dispelling any notion that Dellinger's defense counsel acted improperly.

[9] Defendants next argue that their convictions should be reversed because the trial court improperly admitted testimony of Smith Grading's ownership interest in two other contracting

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6. In addition, the fact that disclosure came from a source other than the prosecutor is of no consequence. When determining the constitutional validity of a belated *Brady* disclosure, the relevant inquiry is solely whether the defendant was able to effectively use the exculpatory information. *See United States v. McCrary*, 699 F.2d 1308 (11th Cir.1983).

companies. During defendant Lee's cross-examination, the government elicited testimony that Smith Grading owned part of the contracting firms RWF, Inc. and Bingham Construction. RWF, Inc. also bid on the Lancaster County sewer project, while Bingham Construction, along with Smith Grading, was a successful bidder on a different job known as the Hampton project. Defendants claim the admission of this evidence was both irrelevant and improper.

Although the relevance of the evidence was limited, the inclusion of Lee's testimony was not an abuse of the trial court's discretion. Smith Grading's ownership interest in both RWF, Inc. and Bingham Construction was probative of defendants' partricipation in the Lancaster County bid rigging scheme. RWF, Inc. only bid on part 2 of the project — the one section Smith Grading did not bid upon. Moreover, Smith Grading's ownership interest in Bingham Construction helped explain particular telephone records, corroborating the defendants' participation in the scheme.

Defendants' sixth claim of reversible error focuses on the trial court's conspiracy instruction. In its charge, the trial court instructed the jury that the defendants must have knowingly participated in a conspiracy in order to be found guilty of violating § 1 of the Sherman Act. The court went on to say that a conspiracy to rig bids is *per se* illegal and, therefore, the government need not prove defendants' specific intent to unreasonably restrain trade. Defendants argue that the court's conspiracy instruction should have included a specific intent instruction.

[10] As indicated in both *United States v. Portsmouth Paving Corp.*, 694 F.2d 312 (4th Cir.1982) and *United States v. Society of Independent Gasoline Marketers*, 624 F.2d 461 (4th Cir.1979), *cert. denied* 449 U.S. 1078, 101 S.Ct. 859, 66 L.Ed.2d 801 (1981), this circuit recognizes *per se* anti-trust violations. Therefore, the trial court correctly instructed the jury that the government must prove the defendants' intentional participation in the conspiracy to rig bids. The government did not have to prove the defendants' specific intent to

unreasonably restrain trade. *See also United States v. Brighton Building*, 598 F.2d 1101 (7th Cir.1979), *cert. denied* 444 U.S. 840, 100 S.Ct. 79, 62 L.Ed.2d 52 (1979).

Defendants' seventh claim is that the trial court erred in its reasonable doubt instruction by not including language that a reasonable doubt is the type of doubt that would make a reasonable person *hesitate* to act. The trial court's instruction included the sentence, "Proof beyond a reasonable doubt is established if the evidence is such as you would be willing to rely and act upon in the more important matters of your own life."[7]

[11, 12] In *United States v. Moss*, 756 F.2d 329 (1985), this Court recently considered the efforts, by trial judges, to define reasonable doubt as well as the variations of language used in the process. The rule from *Moss* is that the term reasonable doubt is self-explanatory. Attempts to further define it are ill advised. Yet, when a district judge does attempt to explain reasonable doubt, his instruction does not constitute reversible error unless it adds such confusion as to be prejudicial to a defendant. In this case, the absence of the "hesitating" language in the trial court's reasonable doubt instruction is not reversible error. Read in its entirety, the instruction was neither

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7. This is one sentence within a lengthy reasonable doubt instruction. The trial judge stated, ". . . a reasonable doubt is not a fanciful doubt or a slight doubt. Neither does proof beyond a reasonable doubt require that the prosecution prove a defendant guilty beyond all doubt. A reasonable doubt is a fair doubt, based upon reason and common sense and arising from the state of the evidence.

"We recognize that it is rarely possible to prove anything to an absolute certainty, and surely the prosecution is not required to do that. Proof beyond a reasonable doubt is established if the evidence is such as you would be willing to rely and act upon in the more important matters of your life. A defendant is not to be convicted on mere suspicion or conjecture or speculation.

". . . A reasonable doubt exists in any case when after a careful and impartial consideration of all the evidence, you jurors do not feel convinced to a reasonable moral certainty that a defendant is guilty of the charges against him."

incomprehensible nor sufficiently misleading. It therefore did not deny the defendants' right to due process of law.

Defendants' eighth claim of reversible error focuses upon a comment made by a U.S. magistrate who was presiding over the case during jury deliberations.[8] The jury asked to rehear portions of the testimony of government witnesses Carpenter and Zeigler. The jury reheard Carpenter's testimony, which was quite lengthy, and then recessed for dinner. When the jury returned, the presiding magistrate explained that counsel had endeavored to streamline Zeigler's testimony in order to save time, but had not reached agreement. The magistrate stated, "I am advised that they have been unable to come to any firm agreement on that because apparently the next witness's testimony goes more directly into the circumstances that you want to hear than the previous witness's testimony." The jury heard Zeigler's testimony and then recessed for the evening.

Defendants contend that the magistrate's statement implied 1) Zeigler's testimony was more probative than Carpenter's testimony and 2) even defense counsel thought this was true. Based on these concerns, the magistrate spoke to the jury the next morning, before they resumed deliberations. The magistrate explained that he did not intend to imply that one witness was more important than another. All he meant to convey was that Zeigler's testimony had less introductory material.

[13] The magistrate's comment is not grounds for the reversal of defendants' convictions. His explanatory instructions rendered his earlier statement harmless. In addition, the jury knew that the magistrate had not been present at trial, and therefore, he did not know the content of the witnesses' testimony. The magistrate did not violate the defendants' right to a fair trial.

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8. United States Magistrate Charles W. Gambrell presided over the case during the jury deliberations at the request of the presiding trial judge, Charles E. Simons, Jr. According to the record, Judge Simons left Rock Hill, South Carolina because of a prior commitment.

[14] In their ninth claim of error, defendants argue that there was insufficient evidence presented at trial to support their conspiracy convictions. This claim is also meritless. A jury's verdict must be sustained if any rational trier of fact could find guilt beyond a reasonable doubt when the evidence is viewed in the light most favorable to the government. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Portsmouth Paving Corp., supra* at 317. When viewed in this light, the prosecutor's case included sufficient evidence to support the jury's conviction on Count 1 of the indictment. The jury believed Carpenter and Zeigler, the defendants' co-conspirators. Moreover, the bid submissions and telephone records support the government's case.

Next defendants argue that they were denied due process of law because the jury verdict was against the weight of the evidence. This claim also deserves short consideration. The applicable question before us is whether the district court abused its discretion by not granting the defendants' motion for a new trial. *United States v. Lincoln*, 630 F.2d 1313 (8th Cir.1980). There was no such abuse. The evidence in this case does not sufficiently preponderate against the verdict to render that verdict a miscarriage of justice.

Finally, defendants argue for a reversal of their convictions on grounds that the cumulative effect of all the above mentioned errors denied them their right to a fair trial. Again, the defendants' claim lacks merit. Whether considered singularly or together, all the defendants' arguments fail to justify reversal. This Court AFFIRMS the convictions below.

APPENDIX B
JUDGMENT
UNITED STATES COURT OF APPEALS
for the
Fourth Circuit
No. 84-5131
CR 83-319

FILED
JUN 18 1985 a.m./p.m.
JOHN W. WILLIAMS, CLERK
U.S. DISTRICT COURT

United States of America,

Appellee,

vs.

Dellinger, Inc. and Theodore C. Dellinger,

Appellant.

Appeal from the United States District Court for the --------- *District of* South Carolina.

This cause came on to be heard on the record from the United States District Court for the ------ *District of* South Carolina, *and was argued by counsel.*

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

FILED
APR 22 1985
U.S. Court of Appeals
Fourth Circuit

CLERK

Petition For Rehearing
Filed 5/7/85
Denied 6/6/85

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 84-5131

FILED
JUN - 6 1985
U. S. Court of Appeals
Fourth Circuit

United States of America,

Appellee,

versus

Dellinger, Inc. and Theodore C. Dellinger,

Appellant.

Appeal from the United States District Court for the District of South Carolina, at Rock Hill. Charles E. Simons, Jr., District Judge.

The appellant's petition for rehearing and suggestionor rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Williams, United States

District Judge, sitting by designation, with the concurrence of Judge Phillips and Judge Wilkinson.

For the Court,

JOHN M. GREACEN

CLERK

APPENDIX D

JOURNAL ENTRIES OF VERDICT AND JUDGMENT

3-9-84	*JURY VERDICT*	Deft. *Dellinger, Inc. - GUILTY as to Counts 1, 2 & 3.* (Sentencing deferred for presentence report)
5-30-84	JUDGMENT AND ORDER IMPOSING FINE (CESjr)	Ct. 1 - Fine of $150,000.00. Cts. 2 & 3 - Fine of $10,000.00 on each count. (Total fine: $170,000.00) (EOD 5-30-84) mld
3-9-84	*JURY VERDICT*	as to defendant Theodore C. Dellinger; *Guilty as to Cts. 1, 2, & 3.* (Sentencing deferred; bond continued)
5-30-84	JUDGMENT & COMMITMENT ORDER (CESjr)	Ct. 1 - CAG Three (3) Years and pay Fine of $15,000.00, prov. on service of Six (6) Months, balance of inst. sent. is suspended on Three (3) Years Probation w/special condition: pay fine at

such times & in such amounts as directed by USPO. On each of Cts. 2 & 3, CAG Three (3) Yrs., prov. on service of 6 Mos., balance susp. on Three (3) Years Probation, concurrent w/each other and w/court 1. Court recommends that Bureau of Prisons designate the Mecklenburg County Jail Satellite facility for service of the sentence and that he report as directed to the institution. (EOD 5-30-84) mld

APPENDIX E

REASONABLE DOUBT

Now you heard a great deal about reasonable doubt. I charge you, ladies and gentlemen, that a reasonable doubt is not a fanciful doubt or a slight doubt. Neither does proof beyond a reasonable doubt require that the prosecution prove a defendant guilty beyond all doubt. A reasonable doubt is a fair doubt, based upon reason and common sense and arising from the state of the evidence.

We recognize that it is rarely possible to prove anything to an absolute certainty, and surely the prosecution is not required to do that. Proof beyond a reasonable doubt is established if the evidence is such as you would be willing to rely and act upon in the more important matters of your own life. A defendant is not to be convicted on mere suspicion or conjecture or speculation.

A reasonable doubt may arise not only from the evidence deduced, but also from the lack of evidence. And since the burden is upon the prosecution to prove the defendant's guilt beyond a reasonable doubt of every essential element of the crime charged, a defendant has the right to rely upon the failure of the prosecution to establish such proof. The defendant may rely upon evidence brought out on cross-examination of witnesses for the prosecution, and our law does not impose upon a defendant the duty of producing any evidence or calling any witnesses.

A reasonable doubt exists in any case when after a careful and impartial consideration of all of the evidence, you jurors do not feel convinced to a reasonable moral certainty that a defendant is guilty of the charges against him.

I — excuse me just a moment, I have gotten something out of order here.

* * *

MR. WILLIAMS: We would also request, your honor, in your instruction regarding reasonable doubt, as I recall, you instructed the jury that a reasonable doubt would — proof beyond a reasonable doubt would be proof of such convincing character that the jury would be — that the jury would be willing to rely upon it in the most important affairs of their business and personal life.

THE COURT: That's right. That's right.

MR. WILLIAMS: And it's my understanding of the law that they would — it would be of such character that they would unhesitatingly be willing to rely upon it —

THE COURT: Well, I gave the charge in the manner I have been giving it for years, and if you can convince that fine 4th Circuit I was wrong in not using your terminology, it is about time they let me know about it. You can have an exception on that.

I wouldn't bring them back and recharge them on that. I have been giving that charge for nigh on 20 years, even when you were on the other side of the fence.

MR. WILLIAMS: Your honor, my recollection is, I learned from you, learned from you, you use the word unhesitatingly.

THE COURT: Never. Never used it — you had some other Judge in mind, sir.

MR. WILLIAMS: Surely not, your honor. I would not seek to emulate any other.

(Laughter)

APPENDIX F

INTENT

Now, ladies and gentlemen, under this Sherman Act, a conspiracy to allocate projects or rig bids, is automatically or *per se* unreasonable and illegal. Therefore, where two or more persons agree that one will submit a bid for a project higher or lower than the others, or that one will not submit a bid at all, then so long as the interstate commerce element which I have described to you a moment ago, is satisfied, there has been an unreasonable restraint of trade which violates the Sherman Anti-trust Act.

You are not to consider whether the defendants' conduct was reasonable or unreasonable. You should not consider the economic impact of the conspiracy, since its bad effect on competition is assumed under the law, if it involves illegal or wrongful bid-rigging.

This means that if there was a conspiracy as charged, it does not matter whether the prices paid on the construction project were reasonable or unreasonable, high or low, fair or unfair. You are not to decide whether the alleged conspiracy was wise or unwise, healthy or destructive, or to speculate on the degree to which competition was restrained on the construction projects, or determine whether the alleged conspiracy actually increased the cost of the projects.

Our law makes illegal every conspiracy formed for the purpose of allocating projects or rigging bids. The illegality arises from the fact of the understanding or agreement to rig bids.

A conspiracy to allocate projects or rig bids, as charged in Count 1 of the indictment, cannot be justified under the law, even though the conspiracy may have been formed or engaged in to prevent or halt ruinous competition, or eliminate the evils of price cutting, or to give each competitor what the co-conspirators think is a fair share or his fair share of the market.

The crime charged in Count 1 requires of intent before any defendant can be convicted. To establish the required intent the

government must prove beyond a reasonable doubt that the defendants knowingly did something which the law forbids. In this case that means that the government must prove beyond a reasonable doubt that the defendants knowingly formed, joined or participated in a combination or a conspiracy to allocate the projects as described in the indictment, or to submit collusive and noncompetitive bids on the project. Since, as I have instructed you, a combination or conspiracy to allocate a construction project, or to rig bids, is unreasonable and illegal as a matter of law, the government does not have to prove that the defendants specifically intended to unreasonably restain trade or to violate the Sherman Act or that such conduct is an unreasonable restraint of trade.

The word "knowingly," as that term has been used, and is used in this instruction, means that the act was done voluntarily intentionally, and not because of mistake or accident or any other innocent reason. And of course the purpose of adding the word "knowingly" is to ensure that no defendant will be convicted of an act done because of inadvertence or accident or any other innocent reason, as I said.

If a defendant's act, knowingly done, resulted in an agreement or understanding of the type forbidden by the Sherman Act, such as an agreement to rig bids, the element of intent is established.

It is also unnecessary for the prosecution to prove that the defendants knew that the agreement, combination or conspiracy to allocate the construction project, or to rig bids, was a violation of the law. Thus, ignorance of the law would be no excuse, insofar as this conspiracy charge is concerned.

* * *

THE COURT: Now is the time for you to get your exceptions or requests for additional charge in the record, whichever, or both.

MR. WILLIAMS: Your honor, we object to the court's

failure to charge, and request that the court c charge, our request No. 2, No. 4, No. 13, No. 12 —

THE COURT: Well, let's just take them up one at a time.

MR. WILLIAMS: All right, sir.

THE COURT: 2 and 4, of course, involves specific intent. Specific intent is not an essentjal element as such in a conspiracy charge under the antitrust law. As I understand the law, it must — there must be an intent to knowingly do an act to become a member and participate in a conspiracy, not specific intent, which I did charge as to Counts 2 through 6.

So I refuse to give that charge. I covered the other portions of your charge other than specific intent, and you may have an exception on my failure to do 2 and 4.

MR. WILLIAMS: Thank you, sir.

THE COURT: Taking them one at a time, what other?

MR. WILLIAMS: No. 13, your honor. No. 13 is based primarily on the case of *U.S. vs. United States Gypsum Company*, which we think addresses the issue of intent —

THE COURT: Well, I've already commented as to why I wouldn't charge it in its entirety. I think the applicable parts of that charge were covered in substance. Certain parts are inappropriate, according to my view, because they are phrased in the language of a civil antitrust action.

And the other part of it was not charged because this is not a rule or reason criminal violation, but this is an alleged *per se* antitrust violation involving bid-rigging. So, I would deny that request and you may have an exception.

U.S.A. v. DELLINGER

DEFENDANT'S REQUEST TO CHARGE NO. 2

The crime charged in this case requires proof of specific intent before the Defendant can be convicted. Specific intent, as the term implies, means more than the general intent to commit the act. To establish specific intent the government must prove that the Defendant knowingly did an act which the law forbids, or (knowingly failed to do an act which the law requires), purpose-

ly intending to violate the law. Such intent may be determined from all the facts and circumstances surrounding the case as well as from similar prior crimes and transactions.

Authorities:

Instructions proposed by the government in *United States v. Mayer*, (W.D. Ill. 1969)

33 F.R.D. at 550.

Devitt and Blackmar §13.03.

United States v. A & P Trucking Co., 358 U.S. 121 (1958).

Morissette v. United States, 342 U.S. 246 (1951).

Stringer v. Dilger, 313 F.2d 536 (10th Cir. 1963).

Bernstein v. United States, 234 F.2d 475 (5th Cir. 1956).

U.S.A. v. DELLINGER
DEFENDANT'S REQUEST TO CHARGE NO. 13

The mere passing of price information does not create an inference of a conspiracy nor does it state a claim for a violation of the 15 U.S.C. §1 (The Sherman Antitrust Act). *Sausalito Pharmacy v. Blue Shield of California*, 544 F. Supp. 230, at 241 (ND Calif 1981).

Concerted action in the context of an antitrust conspiracy requires evidence of a conscious commitment by the alleged coconspirators to a common, illegal scheme. An antitrust conspiracy may be inferred from three elements: (1) evidence of an unlawful "common design" between the alleged coconspirators, (2) knowledge by each alleged member of the other's involvement, and (3) joint participation in the unlawful

scheme. *White & White, Inc. v. American Hospital Supply*, 540 F. Supp. 951, at 1015 (WD MICH 1982).

To be a member such a conspiracy a party must know of it, and intentionally assist in its furtherance. To convict a Defendant of this crime the Government must prove beyond a reasonable doubt that he was a member of a conspiracy whose purpose was to effect an unreasonable retraint on interstate or foreign commerce. *United States v. Brighton Building*, 590 F. 2d 1101, at 1104-1105 (CA 7 1979).

A Defendant's state of mind or intent is an element of a criminal antitrust offense which must be established beyond a reasonable doubt by evidence and inferences drawn therefrom; it cannot be taken by you, the jury, through reliance upon a legal presumption of wrongful intent from proof of an effect upon prices. It is as true in a sophisticated criminal antitrust case as in one involving any other criminal offense that intent remains an indispensable element of the Government's proof. It may be difficult for today's businessman to tell in advance whether projected actions will run afoul of the Sherman Antitrust Act's criminal strictures. With this hazard in mind, the criminal process should be used only where the law is clear and the facts reveal a flagrant offense and plain intent unreasonably to restrain trade. In a conspiracy, two different types of intent are required — the basic intent to agree, which is necessary to establish the existence of the conspiracy, and the more traditional intent to bring about the object of the conspiracy. The latter requirement is satisfied "where carefully planned and calculated conduct" by the perpetrator reveals his knowledge of the anticipated consequences. *U.S. v. United States Gypsum Co.*, 438 U.S. 422 at 435, 437, 439, 443 n. 20, 446 (1978).

APPENDIX G

CONSTITUTION OF THE UNITED STATES OF AMERICA
AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

15 USC §1

TRUSTS, ETC., IN RESTRAINT OF TRADE ILLEGAL: PENALTY

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several Stages, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

18 USC §1001

§1001. STATEMENTS OR ENTRIES GENERALLY

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 USC §2

§2. PRINCIPALS

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if

directly performed by him or another would be an offense against the United States, is punishable as a principal.

FEDERAL RULES OF EVIDENCE

RULE 402 RELEVANT EVIDENCE GENERALLY ADMISSIBLE; IRRELEVANT EVIDENCE INADMISSIBLE.

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these Rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

FEDERAL RULES OF EVIDENCE

RULE 403 EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION OR WASTE OF TIME.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

FEDERAL RULES OF EVIDENCE

RULE 404(b) OTHER CRIMES, WRONGS, OR ACTS.

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

FEDERAL RULES OF EVIDENCE

RULE 410 INADMISSIBILITY OF PLEAS, PLEA DISCUSSIONS, AND RELATED STATEMENTS.

Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(1) a plea of guilty which was later withdrawn;

(2) a plea of nolo contendere;

(3) any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding either of the foregoing pleas; or

(4) any statement made in the course of plea discussions with any attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

FEDERAL RULES OF EVIDENCE

RULE 608(b) SPECIFIC INSTANCES OF CONDUCT.

Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character

for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility.

FEDERAL RULES OF EVIDENCE

RULE 611 MODE AND ORDER OF INTERROGATION AND PRESENTATION.

(a) CONTROL BY THE COURT. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) SCOPE OF CROSS-EXAMINATION. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The Court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(c) LEADING QUESTIONS. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading question.

RULE 802. HEARSAY RULE.

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

Supreme Court, U.S.
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OCT 30 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-199

In the Supreme Court of the United States

OCTOBER TERM, 1985

DELLINGER, INC. AND THEODORE C. DELLINGER,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the trial court abused its discretion under Fed. R. Evid. 404(b) by admitting evidence of similar criminal acts to show petitioners' intent to enter into an unlawful conspiracy in this case.

2. Whether Fed. R. Evid. 608(b) prohibits the introduction of extrinsic rebuttal evidence on a material issue where the evidence shows prior criminal conduct by a defendant.

3. Whether the trial court was required to instruct the jury that it must find not only that the defendants in this case knowingly conspired to rig bids, but also that they specifically intended thereby to restrain trade.

4. Whether the trial court's instruction on reasonable doubt constitutes reversible error.

5. Whether a magistrate's comment regarding certain evidence read to the jurors during their deliberations constitutes reversible error.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 21-32) is reported at 760 F.2d 527.

JURISDICTION

The judgment of the court of appeals (Pet. App. 33) was entered on April 22, 1985. A petition for rehearing was denied on June 6, 1985 (Pet. App. 34). The petition for a writ of certiorari was filed on August 2, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners Dellinger, Inc., and Theodore C. Dellinger, its president, were convicted on one count of violating Section 1 of the Sherman Act, 15 U.S.C. 1, and on two counts of submitting false statements to the government, in violation of 18 U.S.C. 1001. The corporation was fined a total of $170,000. Mr. Dellinger was fined $15,000 on the

Sherman Act count and given concurrent sentences of three years' imprisonment, with all but six months suspended in favor of three years' probation, on each count. Pet. App. 35-36. The court of appeals affirmed (Pet. App. 21-32).

1. The charges arose from a scheme to rig bids on a federally funded sewer construction project in Lancaster County, South Carolina. The project had been divided into four sections for bidding purposes. Representatives of all four winning bidders — Dellinger, his co-defendant, H.P. "Joe" Lee of Smith Grading and Paving, Inc., and government witnesses Frank Carpenter and B.S. "Steve" Zeigler[1] — stayed at the same motel on December 18, 1978, the evening before the bidding, and had dinner with a group of other contractors and suppliers. According to Carpenter's and Zeigler's testimony, they met afterwards in Zeigler's room and agreed to divide the four sections among themselves and to submit complementary bids for each other (J.A. 178-182, 400-410). To implement the agreement, they twice contacted representatives of seven other potential bidders, first to determine whether they would cooperate, and later to give them figures above which other bids should be (J.A. 402-405).

Two of these seven potential bidders were at the same motel. The evidence at trial included records of two telephone calls to each of four others the following morning and one telephone call to the fifth, who came to Lancaster in person on the morning of December 19. The bid preparation sheets for one of the other firms contained figures that

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[1]Carpenter and Zeigler were testifying pursuant to earlier plea bargains with the government. Zeigler had pleaded guilty to bid rigging on the Lancaster project. Carpenter, whose family had a substantial financial interest in Dellinger, Inc. (J.A. 165-170, 222-223, 529-537), had pleaded guilty to bid rigging on a project in North Carolina and had agreed to testify in return for not being prosecuted in other cases. ("J.A." refers to the Joint Appendix in the court of appeals.)

were identified as "numbers that we were supposed to bid above" (J.A. 267, 285-288, 295, 847). All of the winning bids were below these figures, and all but three of the aggregate 27 losing bids were above them (J.A. 845). Finally, the winning bidders' gross profits on the projects were all much higher than the industry norm of 15% to 20% of project costs (J.A. 195, 427); for example, Dellinger's was 32.5%, even though there were eight competing bidders (J.A. 473-475).

2. In the course of his testimony, Carpenter enumerated three other incidents in 1978 and 1979 in which petitioner Dellinger had participated with him in rigging bids (J.A. 201-207). The trial court followed this testimony immediately with a jury instruction, which was repeated in the final charge, that the evidence was to be considered only with respect to Dellinger's intent, motive, or knowledge, and only if the jury found beyond a reasonable doubt from other evidence that Dellinger had done the acts charged in the indictment (J.A. 207-209, 774-775).

Dellinger testified that he had contacted all of the other potential bidders on the Lancaster project, with the exception of Carpenter, but only to seek subcontracts on the sections that he did not intend to bid as prime contractor (J.A. 489-490, 495, 497). He said that he had dinner with a "large group" of suppliers on the evening of December 18, but he did not recall whether Zeigler, Carpenter, or co-defendant Lee were there, and he denied going to Zeigler's room after dinner (J.A. 491-493). Dellinger said that he met Zeigler only on the morning of December 19 to seek work as a subcontractor and to give him prices for that purpose (J.A. 495-501). He denied seeing or contacting Carpenter, whom he had known for years and whose family owned 20% of the stock in Dellinger, Inc., until the bid opening (J.A. 505, 508, 530-531, 620-621).

On cross-examination, the government questioned petitioner Dellinger, without objection, about the other incidents of bid rigging to which Carpenter had testified, and Dellinger denied recollection of them (J.A. 567-589). He also testified that he had not turned in or received a complementary bid on any other project and that he could not recall discussing what he was going to bid on any other project (J.A. 565-566). When asked specifically about a project in the Kensington area of Georgetown County that had been bid on May 15, 1979, he testified that there had been abortive negotiations for a joint venture but that they had ended before any bid figures were exchanged (J.A. 589-594). On rebuttal, the government introduced testimony that Dellinger and representatives of two other firms had "swapped the bottom line number" on their bids for that project after the bids had been prepared but did not change them (J.A. 734-735).

2. The court of appeals affirmed the convictions (Pet. App. 21-32). The court held that evidence of Dellinger's participation in other bid rigging incidents was probative of his knowledge and intent in entering the Lancaster conspiracy and that the district court had not abused its discretion under Fed. R. Evid. 404(b) in admitting it (Pet. App. 26-27). In addition, it held that, if it met the qualifications of Rule 404(b), similar extrinsic evidence was admissible on rebuttal under Rule 608(b) to the extent it was probative of a material issue in the case and not offered solely for the purpose of attacking a witness's credibility (Pet. App. 25). The court noted, however, that trial courts should scrutinize such rebuttal evidence carefully to be certain that it is not unnecessarily cumulative, and that a defendant remains free to object if the underlying cross-examination goes beyond the scope of the direct (*id.* at 26).

The court of appeals also rejected petitioners' challenges to the trial court's jury instructions. The court held that in the case of a conspiracy that is unlawful per se under Section 1 of the Sherman Act, the jury need find only that the defendants intentionally participated in the illegal conspiracy, and that it is unnecessary to instruct the jury that it must find a specific intent to restrain trade unreasonably (Pet. App. 29-30). The court also held that the trial court's definition of "reasonable doubt" in this case, read in its entirety, was "neither incomprehensible nor sufficiently misleading" to constitute reversible error (*id.* at 30-31). Finally, the court found that any prejudice that might have been caused by the magistrate's comment to the jury that Zeigler's testimony went "more directly into the circumstances that you want to hear" than Carpenter's testimony was rendered harmless by the magistrate's subsequent explanation that he meant only that Zeigler's testimony had less introductory material (*id.* at 31).

ARGUMENT

The decision of the court of appeals is correct, and the petition raises no significant issue of law that warrants review by this Court.

1. Petitioner contends (Pet. 9-10) that the trial court erred in admitting under Fed. R. Evid. 404(b) Carpenter's testimony about petitioners' other bid rigging activities. This contention is without merit.

Rule 404(b) excludes evidence of other crimes only to the extent that it is offered "to prove the character of a person in order to show that he acted in conformity therewith." Such evidence is admissible, however, if it is relevant to another material issue, such as motive, intent, or plan. The various courts of appeals have consistently held that proof of similar bad acts is relevant to show intent to participate in a conspiracy unless the defendant affirmatively takes the

issue of intent out of the case. See, *e.g.*, *United States* v. *Kopituk*, 690 F.2d 1289, 1334-1335 (11th Cir. 1982), certs. denied, 461 U.S. 928 and 463 U.S. 1209 (1983); *United States* v. *Roberts*, 619 F.2d 379, 383 (5th Cir. 1980); *United States* v. *Williams*, 577 F.2d 188, 191 (2d Cir.), cert. denied, 439 U.S. 868 (1978).[2] In this case, the other crimes evidence was introduced to demonstrate petitioners' intent and plan, not bad character. And, contrary to petitioners' claim (Pet. 10), Dellinger did not take the issue of intent out of the case. He pressed it at trial and in the court of appeals (see Pet. App. 29-30) and, indeed, continues to press the issue in this Court (see Pet. 16-18).[3]

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[2] *United States* v. *Powell*, 587 F.2d 443 (9th Cir. 1978) (see Pet. 9-10), does not conflict with this line of authority. In *Powell*, the district court refused to admit other crimes evidence to prove intent. The court of appeals approved this decision, stating that "intent is not a material issue" when the defendant denies participation in the crime. 587 F.2d at 448. This comment is clearly dictum, as the court of appeals noted in a subsequent appeal. *United States* v. *Powell*, 632 F.2d 754, 758 (9th Cir. 1980). In any event, the court's comment seems to turn on its finding that "[t]he only factual issue" in the case was the identity of the source of the enormous quantity of marijuana involved—approximately 3,500 pounds (587 F.2d at 448); here, intent had not been eliminated as a factual issue in the case.

[3] Petitioners' counsel's statement at the time of Carpenter's testimony on the other incidents of bid rigging that Dellinger did not rely on lack of intent (J.A. 156-157) did not remove the issue from the case as in *United States* v. *Figueroa*, 618 F.2d 934, 941 (2d Cir. 1980). The court explained in *Figueroa* that defense counsel who wish to remove the issue of intent from a case must do so "with sufficient clarity that the trial court will be justified * * * in charging the jury that if they find all the other elements established beyond a reasonable doubt, they can resolve the issue against the defendant because it is not disputed." *Id.* at 942. In this case, the intent to enter into a bid rigging conspiracy is an essential element of the prosecution's case, and the defendant simply could have relied on the failure of the government's proof of intent without putting on any evidence of his own. Petitioners cannot deny the government the right to introduce evidence on intent while insisting upon a jury instruction requires the government to prove it.

Under Fed. R. Evid. 403, the trial court must also consider whether the probative value of evidence, such as testimony regarding other crimes, is substantially outweighed by the danger of unfair prejudice. This balancing is subject to review for abuse of discretion. Here, the trial court found that it had " 'no hesitance in finding that the probative value of this evidence would substantially outweigh any unfair prejudice' " (see Pet. 10), and the court of appeals concluded that this determination should be upheld (Pet. App. 27).

Petitioners correctly note (Pet. 9-10) that, in describing the balancing function under Rule 403, some courts of appeals have said that the evidence of other acts must be "clear and convincing" in order to be admissible.[4] The decision below, however, is fully in accord with these statements. The testimony at issue was that of an eyewitness and confessed co-conspirator. The evidence related to very similar offenses close in time to the offense for which Dellinger was on trial, and therefore it was highly probative of Dellinger's intent to enter into a bid rigging arrangement with respect to the Lancaster project. Plainly, this evidence satisfied the "probative value" requirement of Rule 403. Any weakness in the testimony was solely a matter of credibility which, as the district court noted, was a matter for the jury to determine (J.A. 206), not the court. Those courts that have used the "clear and convincing evidence" language relied upon by petitioners generally have disavowed any intent to invade the province of the jury by attempting to assess credibility; rather, they "limit themselves to examining whether the *type* of evidence is sufficiently probative"

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[4]See *United States* v. *Lavelle*, 751 F.2d 1266, 1276 (D.C. Cir. 1985), cert. denied, No. 84-1654 (Oct. 7, 1985); *United States* v. *Bronco*, 597 F.2d 1300, 1302-1303 (9th Cir. 1979); *United States* v. *Dolliole*, 597 F.2d 102, 106-108 (7th Cir.), cert. denied, 442 U.S. 946 (1979); *United States* v. *Cobb*, 588 F.2d 607, 612 (8th Cir. 1978).

and "sufficiently advances the inquiry to offset any unfair prejudice." *United States* v. *Moore*, 732 F.2d 983, 988 & 989 n.45 (D.C. Cir. 1984) (emphasis in original). See also *United States* v. *Dolliole*, 597 F.2d 102, 107-108 (7th Cir.), cert. denied, 442 U.S. 946 (1979); *United States* v. *Dabish*, 708 F.2d 240, 243 n.2 (6th Cir. 1983).[5] Hence, there is no basis for petitioners' suggestion that the decision below creates a conflict in the circuits; even in those circuits that have articulated a "clear and convincing" standard, the district court's decision here to admit the other crimes evidence would have been upheld.[6]

2. Rule 608(b) of the Federal Rules of Evidence limits the evidence that can be used to attack the credibility of a witness. The Rule provides that specific instances of a witness's conduct may not be proved by extrinsic evidence "for the purpose of attacking * * * his credibility." Petitioners contend (Pet. 11-13) that this rule was violated when the trial court allowed a rebuttal witness to testify to Dellinger's bid rigging in Kensington, South Carolina, after Dellinger had denied it. This claim does not merit review.

Petitioners suggest that the court allowed this evidence solely to impeach Dellinger's credibility by impugning his character, thereby allegedly opening the door "to permit the introduction of specific acts of prior misconduct whenever a Defendant takes the stand" (Pet. 12). But the holding of the

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[5]While the Eighth Circuit has not been so explicit, its explanation of the "clear and convincing" test also refers to the adequacy of the evidence to show the relevant elements of the other crime alleged, not the credibility of the witnesses testifying to it. See, *e.g.*, *United States* v. *Clemons*, 503 F.2d 486, 490 (1974).

[6]We note that there is little danger of prejudice to the defense where the evidence falls short of satisfying the "clear and convincing" standard simply because its source is a witness who is not credible. If the jury found Carpenter's recounting of prior bid rigging incidents not credible, it presumably would not credit it. The testimony would then be harmless to the defendants.

court of appeals does not sweep so broadly. The court's decision does not permit the use of extrinsic evidence of prior bad acts to attack a witness's credibility by impugning his character; rather, it carefully limited the use of such evidence to situations where it is "probative of a material issue in a case" — in this case, Dellinger's intent (see Pet. App. 25). So limited, the court's holding is entirely consistent with the decisions of other circuits and with the purposes of Rule 608(b).

Rule 608(b) is designed to expedite trials and to protect witnesses by excluding extrinsic evidence of specific instances of conduct when it is used only to show that a witness is a "bad person" who should not be believed. *United States* v. *DiMatteo*, 716 F.2d 1361, 1365-1367 (11th Cir. 1983), vacated on other grounds, No. 83-1554 (Jan. 7, 1985), on remand, 759 F.2d 831 (1985); *United States* v. *James*, 609 F.2d 36, 46 (2d Cir. 1979), cert. denied, 445 U.S. 905 (1980); *United States* v. *Opager*, 589 F.2d 799, 801 (5th Cir. 1979). The Rule does not eliminate, however, the common law principle of "specific contradiction," which states that extrinsic rebuttal evidence is admissible to contradict a statement made by the witness, so long as "the fact, as to which error is predicated, [could] have been shown in evidence for any purpose independently of the contradiction." IIIA, *Wigmore on Evidence* § 1003, at 961 (Chadbourne rev. 1970) (emphasis omitted). See 3 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶¶ 607[05], 608[05] (1985); *Simmons, Inc.* v. *Pinkerton's, Inc.*, 762 F.2d 591, 604-605 (7th Cir. 1985); *Head* v. *Halliburton Oilwell Cementing Co.*, 370 F.2d 545, 546 (5th Cir. 1966). Admissible evidence is not rendered inadmissible just because the defendant testifies falsely concerning it. Having found evidence of other incidents of bid rigging by Dellinger material to the issue of intent and thus admissible as part of the prosecution's case-in-chief under Rule 404(b), the court of appeals

correctly found that the rebuttal evidence of another incident was not collateral and hence not excluded under Rule 608(b). *United States* v. *Opager*, 589 F.2d at 801-803; see also *United States* v. *Halbert*, 712 F.2d 388, 390-391 (9th Cir. 1983), cert. denied, 465 U.S. 1005 (1984); *United States* v. *Cutler*, 676 F.2d 1245, 1249 (9th Cir. 1982); *United States* v. *Jacobson*, 578 F.2d 863, 866-867 (10th Cir. 1978). See generally 3 J. Weinstein & M. Berger, *supra* ¶ 608[05], at 608-23 & n.10. The evidence was introduced to contradict Dellinger's testimony regarding a material issue that could have been raised in the government's case-in-chief, not to bolster a line of cross-examination relating solely to credibility.

Petitioner's assertion that the decision below will open the gates to routine use of bad acts to impeach witness-defendants on rebuttal is unfounded. First, the rebuttal must go to a material issue, not just to general credibility. Second, it must suggest the falsity of a statement on direct examination or in response to a question that is within the scope of legitimate cross-examination. Thus, for example, both *Agnello* v. *United States*, 269 U.S. 20 (1925), and *United States* v. *Pantone*, 609 F.2d 675 (3d Cir. 1979), relied upon by petitioners (Pet. 11-12), are fully consistent with the decision below. In both of those cases, the cross-examination that formed the predicate for admission of the evidence in question was itself improper and permitted only over the defendant's objection, which made the rebuttal improper. See 269 U.S. at 35; 609 F.2d at 680-681; see also *United States* v. *Havens*, 446 U.S. 620, 625 (1980). And in *Pantone*, the court noted that the evidence in question probably would not have been admissible under Rule 404(b). See 609 F.2d at 681. In this case, no objection was ever made to the cross-examination of Dellinger on the

subject of other offenses.[7] The court of appeals' decision in this case is specifically conditioned on the propriety of, or lack of objection to, the underlying cross-examination (Pet. App. 26), and therefore it would not suggest a different result in *Agnello* or *Pantone*. Moreover, the court also conditioned receipt of such rebuttal evidence on close scrutiny by the district court to ensure that it is neither a belated attempt to prove an essential element of the crime charged that should have been introduced during the government's case in chief nor cumulative evidence that ought to be excluded as unduly prejudicial under Rule 403 (*ibid.*). The court's careful and narrow ruling does not warrant review by this Court.

3. The district court instructed the jury (see Pet. App. 39-40) that it could convict the petitioners only if it found that they "knowingly formed, joined or participated in a combination or a conspiracy to allocate the projects as described in the indictment, or to submit collusive and noncompetitive bids on the project" — a per se violation of the Sherman Act. Petitioners contend (Pet. 16-18) that this instruction was inadequate. Relying on *United States* v. *United States Gypsum Co.*, 438 U.S. 422 (1978), they assert that the jury should have been instructed that it must also find a specific intent unreasonably to restrain trade. This contention is without merit.

In *Gypsum*, the Court held that it was necessary to prove an intent to restrain trade in prosecutions arising out of agreements that are judged under a rule of reason, *i.e.*, where the legality of the agreements depends on their effects in specific cases. The Court held that the intent requirement

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[7]Dellinger's counsel objected to the relevance of certain exhibits the government introduced in connection with its cross-examination of Dellinger on other incidents of bid rigging (J.A. 568-572, 575-576) but made no other objection to the line of questioning.

of the criminal provisions of the Sherman Act would be satisfied if the agreement were undertaken either with a purpose of restraining trade, or "with knowledge of its probable consequences and having the requisite anticompetitive effects." 438 U.S. at 444 & n.21. The Court specifically noted, however, that it was not dealing with "conduct regarded as per se illegal because of its unquestionably anticompetitive effects." *Id.* at 440. The illegality of a per se violation is knowable without foreseeing its effects, and there is no danger that criminalizing the knowing participation in a *per se* illegal conspiracy will "criminalize a broad range of apparently innocent conduct" (see *Liparota* v. *United States*, No. 84-5108 (May 13, 1985), slip op. 6-7), or deter any beneficial conduct. An individual who knowingly conspires to commit an action that is per se illegal, such as bid rigging, necessarily has the intent unreasonably to restrain trade. Therefore, the court of appeals correctly upheld the district court's instructions, and its decision accords with that of every other court of appeals that has faced the issue. See *United States* v. *Cargo Service Stations, Inc.*, 657 F.2d 676, 683-684 (5th Cir. 1981), cert. denied, 455 U.S. 1017 (1982); *United States* v. *Koppers Co.*, 652 F.2d 290, 295 n.6 (2d Cir.), cert. denied, 454 U.S. 1083 (1981); *United States* v. *Continental Group, Inc.*, 603 F.2d 444, 461-464 (3d Cir. 1979), cert. denied, 444 U.S. 1032 (1980); *United States* v. *Brighton Bldg. & Maintenance Co.*, 598 F.2d 1101, 1104-1106 (7th Cir.), cert. denied, 444 U.S. 840 (1979).

4. The trial court gave an extensive instruction on reasonable doubt. It charged, inter alia, that: "Proof beyond a reasonable doubt is established if the evidence is such as you would be willing to rely and act upon in the more important matters in your own life." It then noted that the defendant had no burden to produce evidence but could rely on gaps in the prosecution's evidence, and concluded that: "A reasonable doubt exists in any case when after a careful and

impartial consideration of all of the evidence, you jurors do not feel convinced to a reasonable moral certainty that a defendant is guilty of the charges against him." Pet. App. 37. Petitioners objected, requesting a charge that the evidence must be such that the jurors "would unhesitatingly be willing to rely upon it" (Pet. App. 38). The trial court refused that instruction, and the court of appeals affirmed. Relying on its recent decision in *United States* v. *Moss*, 756 F.2d 329, 333-334 (4th Cir. 1985), the court held that the term "reasonable doubt" is "self-explanatory," but that the district court's further explanation, when read in the context of the whole instruction, was "neither incomprehensible nor sufficiently misleading" to require reversal (Pet. App. 30-31).

The court of appeals was correct. There is no talismanic phraseology for defining the concept of reasonable doubt. See *In re Winship*, 397 U.S. 358, 369-370 (1970) (Harlan, J., concurring); 2 C. Wright, *Federal Practice and Procedure: Criminal 2d* § 500, at 806-813 (1982).[8] Nothing in the Court's instruction was misleading, and there is no likelihood that it could have led the jury to convict when the jury in fact had a reasonable doubt. See generally *Holland* v. *United States*, 348 U.S. 121, 140 (1954).

5. During its deliberations, the jury requested that the testimony of Carpenter and Zeigler, the government's chief witnesses, be read back to it, specifically including everything relating to the transactions on the evening of December 18 and the morning of December 19, 1978 (J.A. 40-41, 800-801). Carpenter's testimony was read, and then a dinner recess was taken from 7:44 p.m. to 9:30 p.m. (J.A. 813-814). During the recess, Dellinger's counsel discussed

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[8] While the Court approved a "hesitate to act" formulation in *Holt* v. *United States*, 218 U.S. 245, 254 (1910), it did not suggest that the word "hesitate" was an essential element of any instruction.

with a government attorney the possibility of editing some of Zeigler's testimony to shorten the reading, but the discussions were ended by another government attorney who felt that such editing could not be done fairly, and, moreover, as he explained to the magistrate who was presiding in the trial judge's absence, Zeigler's testimony did not have as much introductory material as Carpenter's (J.A. 821-823, 829). When the jury returned, the magistrate explained to them that an attempt had been made to shorten the reading, but that counsel had been unable to agree "because apparently the next witness' testimony goes more directly into the circumstances that you want to hear than the previous witness' testimony" (J.A. 816). Zeigler's testimony was then read, and the jury retired for the night. The following morning, before the jury resumed its deliberations, the magistrate told the jury that he had made that remark "solely because I was advised that the testimony of the second witness had less introductory matter," and that the weight to be given the testimony was for the jury alone to determine (J.A. 842-843).

Petitioners contend (Pet. 13-14) that they were prejudiced by the magistrate's comment about the "directness" of the testimony, asserting that the jury thereby understood that the testimony was more believable. Even if petitioners were correct that this fairly innocuous comment was prejudicial standing alone, they fail to explain why any possible misapprehension was not dispelled by the magistrate's explanation the following day. The court of appeals correctly concluded that the magistrate's "explanatory instructions rendered his earlier statement harmless" (Pet. App. 31).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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